87-559

Supreme Court, U.S.
FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1987

DANIEL RAMSUNDAR,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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1988

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

I. Did the Connecticut Supreme Court Apply a New Unsanctioned "Generic" Totality of the Circumstances Test for Analyzing the Reliability of ImpermissibIy Suggestive Identification Testimony, Which Disregards and Vitiates the Five Factor Constitutional Criteria Established by this Court in Manson v. Brathwaite and its Progeny, Resulting in an Unconstitutional Conviction Violative of the Petitioner-Defendant's Constitutional Right to the Due Process of Law as embodied in the Fourteenth Amendent of the United States Constitution?

PARTIES

The petitioner is the criminal defendant, Daniel Ramsundar. The respondent is the State of Connecticut.

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DANIEL RAMSUNDAR,

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v.

CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

To The Honorable, The Chief Justice and Associate Justices Of The Supreme Court of The United States:

The petitioner repectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut, entered in this proceeding on June 9, 1987.

OPINIONS OF THE COURT BELOW

The opinion of the Connecticut Supreme Court was published at 526 A.2d 1311 (Conn. 1987)

and 204 Conn. 4 (1987). It appears in the Appendix, beginning at p.1A. The oral decision of the Superior Court for the Judicial District of Hartford/New Britain at Hartford (Corrigan, J.) was entered on June 24, 1987. It is unpublished. A transcript of the Court's comments and decision appears beginning at p.29A of the Appendix.

JURISDICTION OF THIS COURT

Petitioner respectfully shows the following as the grounds upon which the jurisdiction of this Court is invoked:

(i) This case seeks review of a decision of the Supreme Court of Connecticut filed on June 9, 1987. This is a criminal case. (arson).

(ii) Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following

constitutional and statutory provisions:

Fourteenth Amendment to the Constitution of the United States

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

Connecticut General Statute 53a-111

The statute (criminal arson) is found in foootnote 1 of the opinion of the Supreme Court of Connecticut on p.3A-4A of the Appendix.

STATEMENT OF THE CASE

Upon information, endorsed by the State's Attorney for Hartford County, Daniel Ramsundar was charged with the offense of first degree arson in violation of Connecticut General Statues, Section 53a-111.

To that information, the defendant entered a plea of not guilty and elected to be tried by a jury of six.

On June 11, 1985, the State filed a Notice to Introduce Prior Bad Acts or Misconduct. On June 13, 1985, the defendant

filed a Motion in Limine to Preclude Evidence of Prior and Subsequent Bad Acts or Misconduct, which Motion was denied.

On June 11, 1985, the defendant filed a Motion to Suppress Identification Testimony of two of the State's witnesses, as violative of the Federal and State Constitutional Due Process Clauses, the only identification testimony in the trial, which Motion was denied.

On June 28, 1985, at the close of all the evidence, the trial judge charged the jury, commenting on the evidence.

On June 28, 1985, the jury returned a verdict of guilty as charged in the information of first degree arson in violation of C.G.S. Sec.53a-111, which verdict was accepted and ordered recorded by the Court.

On September 9, 1985, the defendant was sentenced to a term of ten years of incarceration, the statutory minimum.

On September 30, 1985, the defendant appealed from the judgement of the Superior Court to the Supreme Court of the State of Connecticut.

On June 9, 1987, the Supreme Court of Connecticut affirmed the defendant's conviction.

STATEMENT OF FACTS

The defendant Daniel Ramsundar is a man of Indian descent,who lived in Guyana, South America, before he came to the United States a number of years ago. The defendant and Miss Lee Rice had a romantic relationship from 1980 through the fall of 1984.

On October 17, 1984, at approximately 11:00PM, a fire was set on the subject property on Woodmere Avenue, West Hartford, Connecticut. There was a trailer from the porch across the grass and driveway with sizeable breaks.

On October 23, 1984, Officer Benequisto, conducted an unsolicited visit to an Exxon

gas station where Miss Parrot was employed and where Arnett regularly visited to help Miss Parrott. The police officer asked the young women questions about whether an individual bought gas in a container the previous week. Arnett and Parrot responded negatively and before they could even consider the question further, they were then shown a single mug shot photo of the defendant and were questioned again if this individual (the defendant) had bought gas in a container the previous week. They again responded negatively and inconclusively (i.e. the individual was not altogether unfamiliar, but they had no recollection of where when, or in what circumstances they might have seen the defendant). There were no exigent circumstances or emergencies to justify this hightly suggestive identification procedure.

On October 25, 1984, Arnett and Parrot allegedly saw the defendant when he allegedly purchased gas for his automobile on October

25, 1985. Arnett and Parrot then telephoned the police, who responded by visiting them again. The same mug shot photo was shown to Arnett and Parrot who, this time, positively identified the defendant as the person who had purchased gas in a container on October 16 or 17, 1985, at night.

On November 9, 1984, an Arrest Warrant was isssued for the defendant, charging him with first degree arson in violation of Connecticut General Statutes, Section 53a-111.

On June 11, 1985, the defendant, through his counsel, moved to suppress the identification testimony of Arnett and Parrot. Arnett and Parrot were the only identification evidence the State had to accuse the defendant. On June 24, 1985, after a supression hearing, Judge Corrigan denied the defendant's Motion to Suppress.

In the State's case in chief, the State presented twenty-four witnesses: two

identification witnesses, two fire officials, one physical evidence expert, three police detectives, two individuals who were sleeping in the house in question, one alibi rebutting witness; the rest of the state's witnesses, thirteen in number, testified to the prior bad acts of the defendant, which had no direct relationshiip to the information at issue. The overwhelming majority of the State's case dealt with these prior unrelated actions of the defendant, not with presenting probative evidence which satisfied the statutory requirements of first degree arson beyond a reasonable doubt. These prior bad acts were not probative and so prejudiced the mind of the jury as to deprive the defendant of a fair trial and necessitated a reversal, and at minimum, a new trial.

There were substantial gaps of evidence in the State's case against the defendant Ramsundar which were bridged by this prior misconduct evidence. This was manifest abuse

of discretion by the Trial Court which helped the State circumvent its constitutional burden of proof by tainting the jurors' minds with the said prior misconduct.

This prior misconduct evidence evidence, along with the unconstitutionaly admitted identification testimony was the circumstantial evidence the State's case was built upon.

During the trial, the State's only identification testimony came from Arnett and Parrot. Their testimony did not place the defendant at the scene of the crime. No one apparently saw the arsonist. The circumstantial bridge linking the defendant with the crime was the prior bad acts testimony. Without Arnett and Parrot's testimony, the defendant's Motion for Acquittal at the close of the State's case would have been granted.

REASONS FOR GRANTING THIS WRIT OF CERTIORARI

SUMMARY ARGUMENT

Pursuant to Rule 17.1(c) of the Rules of the Supreme Court, the Court should grant this petition and review this case to settle an important question of federal law presently in erosion among State and Federal Courts.

In addition to the specific merits of this case, the Court needs to address, for the purposes of formulating and enforcing a consistant national judicial policy, the crucial issue of (1) what factors must be applied in determining the reliability of impermissibly suggestive identification testimony, particularly whether those five factors mandated by Manson v. Brathwaite can be disregarded and replaced by a generic "totality of the circumstances test."

I.

The seminal case of this Court dealing

with pretrial photographic displays is Manson v. Brathwaite, 432 U.S. 98 (1977). In the Manson case, this Court dealt with the unconstitutionally and impermissibly suggestive single photgraphic display of the defendant to a Connecticut police officer. In analyzing the due process clause impact upon this pretrial identification, the Court set up a threefold inquiry:

1. Whether the identification procedure is impermissibly suggestive;

2. Whether the procedure was necessary, despite its suggestiveness;

3. Whether the identification possesses sufficient aspects of reliability despite the suggestive procedure.

In Manson, this Court mandated five factors to be considered in engaging in the third prong reliability analysis. These five factors were: The opportunity of the witness to view the criminal at the time of the crime; The witness' degree of attention; The

adequacy of his prior description of the criminal; The level of certainty demonstrated at the confrontation; and, The time between the crime and the confrontation. Id. at 114. "Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

Although the Connecticut Supreme Court enumerated these five factors, they did not even attempt to apply them in this case.

The Connecticut Supreme Court misplaced its reliance upon Circuit Court opinions to justify its disregard of the five factor test propounded in Manson. This new "factorless, generic" totality test, used by both the trial court and Connecticut Supreme Court vitiates the five factor Constitutional criteria mandated by this Court in Manson for reliability analysis and thereby violated the defendant's Constitutional right to the Due Process of Law as embodied in the Fourteenth Amendent of the United States Constitution.

ARGUMENT

The Connecticut Supreme Court Applied a New Unsanctioned "Generic" Totality of the Circumstances Test for Analyzing the Reliability of ImpermissibIy Suggestive Identification Testimony, Which Disregards and Vitiates the Five Factor Constitutional Criteria Established by this Court in Manson v. Brathwaite and its Progeny, Resulting in an Unconstitutional Conviction Violative of the Petitioner-Defendant's Constitutional Right to the Due Process of Law as embodied in the Fourteenth Amendent of the United States Constitution.

The seminal case of this Court dealing with pretrial photographic displays is Manson v. Brathwaite, 432 U.S. 98 (1977). In the Manson case, this Court dealt with the unconstitutionally and impermissibly suggestive single photgraphic display of the defendant to a Connecticut police officer. In analyzing the due process clause impact upon this pretrial identification, the Court established a threefold inquiry:

1. Whether the identification procedure is impermissibly suggestive;

2. Whether the procedure was necessary,

despite its suggestiveness;

3. Whether the identification possesses sufficient aspects of reliability despite the suggestive procedure.

Testimony of an out-of-court identification will be excluded if the identification procedure was so unnecessarily and impermissibly suggestive that there is a substantial likelihood of misidentification. Id. at 114.

In Manson, this Court mandated five factors to be considered in engaging in the third prong reliability analysis. These five factors were:

1. The opportunity of the witness to view the criminal at the time of the crime;

2. The witness' degree of attention;

3. The adequacy of his prior description of the criminal;

4. The level of certainty demonstrated at the confrontation; and,

5. The time between the crime and the

confrontation. Id.

"Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

The Court then went on to say "We turned, then, to the facts of this case and apply the analysis:". Id. This Court, in its analysis, found that under the five factors, the totality of the circumstances did not require the identification of Officer Glover to be excluded.

This Court went on to caution, however, that "identifications arising from single-photograph displays may be viewed in general with suspicion, see Simmons v. United States 390 U.S., at 383." Id. at 116.

In speaking of the just enumerated five factors, this Court mandated their application by stating:

> We conclude that the criteria laid down in Biggers are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-Stovall identification, and that those criteria

> are satisfactorily met and complied with here.

Id. at 117.

It is this very mandate of this Court that has been ignored and evaded by the Supreme Court of the State of Connecticut.

Although the Connecticut Supreme Court enumerated these five factors, they did not even attempt to apply them in this case. Appendix at 14A-15A. The Connecticut Supreme Court stated:

> Since neither Arnett nor Parrot was a victim of the arson in question or a witness to its actual occurance, an analysis of the circumstances of their identifications of the defendant does not fit neatly into the Manson matrix of factors normally considered in determining reliability. The factors considered in Manson, however, are not required to be present seriatim for an identification to be found reliable. United States v. Merkt, 794 F.2d 950, 958 (5th Cir. 1986), cert. denied __U.S.__, 107 S. Ct. 1603, 94 L. Ed. 2d 789 (1987); United States v. Woolery, 740 F. 2d 359, 360-361 (5th Cir. 1984), cert. denied 469 U.S.1208, 105 S. Ct. 1172, 84 L. Ed. 2d 322 (1987);

Although this observation by the Connecticut Supreme Court may be true, namely, that the

particular factual circumstances of this case do not fit neatly into the Manson matrix, nevertheless the Court did not even attempt to apply all the five factors to the facts in this case. The Court merely looked at the facts and suggested a common sense totality of the circumstances test, without applying the five factors mandated by this Court. If the Connecticut Supreme Court had applied those five factors, they would have been required to reverse the judgment of the Superior Court and reverse the defendant's conviction.

The defendant respectfully submits that the Connecticut Supreme Court's affirmance of the trial court's denial of his Motion to supppress the testimony of the prior out-of-court identification of the defendant by the State's witnesses, Patricia Parrot and Tammey Arnett, and the denial of his Motion to prevent any in-court identification of the defendant by the same witnesses

constitutes a deprivation of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

A "Wade/Gilbert" hearing, in the absence of the jury, was held, during which the trial court heard evidence relating to the suggestiveness of the out-of-court identification procedure and the reliability of an in-court identification.

In analyzing this test, an observation of constitutional dimension was made by this Court: (after the photo identification procedure) "The witness is subsequently likely to retain in his or her memory the image of the photograph rather than of the person actually seen." Simmons v. U.S. 390 U.S. 377, 383 (1968).

On October 23, 1985, Officer Benequisto visited witnesses Arnett and Parrot and showed them only one photo, that being of the defendant, and asked them if this man had bought gas in a container the previous week.

Witness Arnett did not recall anyone coming in the week before to buy gas in a container, neither did she have any recollection of the man in the photo coming in the week before. Although she wasn't altogether unfamiliar, she couldn't place him. The photograph was of police origin, commonly called a "mug shot". This single photograph had the usual two views of the defendant.

On October 25, 1985, witnesses Arnett and Parrot identified the defendant as a man who purchased gas that day at the Exxon station and this confrontation supposedly jogged their memory that the defendant purchased gas the previous week in a container. It is this "memory jogging" that the trial court relied upon to allow the witnesses to identify the defendant in court although the trial court admitted that the originally showing of just one picture was impermissably suggestive. Appendix at 42A-44A.

It is submitted that the original showing

of one photograph by Officer Benequisto coupled with inquiries regarding buying gas in a container by a person known to be a police officer (Officer Benequisto) was so unnecessary and impermissably suggestive that there is a substantial likelihood of irreparable misidentification. It is only after the photograph was shown to the two witnesses that their "memory was jogged" two days later. The State made no argument that the single photograph identification procedure was necessary nor that exigent circumstances existed to justify not showing an array of photos. The argument then hinges on the issue of independent reliability.

If the Connecticut Supreme Court had applied the Manson matrix of factors, this analysis follows:

1. The opportunity of the witness to view the criminal at the time of the crime. In the present case, the two identification witnesses were not present at the scene of

the crime, nor did the identification take place at the time of the crime. The witnesses testified that when they allegedly saw the defendant on October 25, 1985, they clearly saw his height and face when he paid for the gas. This incident allegedly "jogged their memory" that it was the same man who had purchased gas the previous week in a container.

Witness Parrot admitted she did not pay close attention to him on the alleged October 17th gas container purchase. She thought he was just a regular customer. She further testified that the defendant's features were present in the photograph shown her on October 23. The witnesses had no reason to concentrate, observe, or give opportunity to clearly view the defendant on October 25 if they had not seen his single mug shot photo, shown by a police officer, who questioned about buying gas in a container on October 23, 1985, about a crime which happened on

October 17, 1985.

2. The witnesses' degree of attention.

The two witnesses' attention on October 17, 1985, was insubstantial. They were not like Officer Glover, who was

> . . . a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to closed scrutiny and examination at any trial.

Manson at 115. As this Court observed in Manson, Arnett and Parrot were, "casual or passing observer[s], as is so often the case with eyewitness identification." Id. at 115.

They did not see the alleged gasoline container, as the car was between them and the defendant who was pumping gas. The two young women did not concentrate on the night of October 17, in identifying any person who bought gas in a container, but rather, at their first questioning by the police on

October 23, stated that they had no recollection of anyone buying gas in a container the previous week.

It is only after:

1) The mug shot photo of the defendant was shown to the two women, and
2) The police officer specifically asked them if the man pictured in the mug shot had bought gas in a container the previous week, that the witnesses' "memories were jogged" two days later by allegedly seeing the defendant purchase gas for his car at the station.

3. The accuracy of the witnesses' prior description of the criminal.

In this case, the two witnesses were asked, but gave no prior description Before, the witnesses could ponder further the description anyone who might have purchased gas in a container the previous week, they were shown the highly suggestive single mug

shot photograph of the defendant, which, coupled with Officer Benequisto's inquiries, clearly tainted their minds as to any future identification.

4. The Level of certainty demonstrated at the confrontation.

The two witnesses testified that their observations of the defendant on October 25 jogged their memory of this defendant being the gas container purchaser on October 17. But how reliable was their memory? When they were questioned on October 23 by Officer Benequisto, they did not remember any individual who purchased gas in a container, nor did they identify the defendant at the confrontation when they were shown only the single mug shot. However, two days later, on October 25, 1985, the two witnesses positively identified the defendant when the police, for a second time, showed the mug shot photo of the defendant. Their level of certainty at the initial single mug shot

photo confrontation on October 23 was totally inconclusive. They could not remember either an individual purchasing gas the previous week nor could they identify the defendant.

It is submitted that their memory already had the impermissible suggestive procedure stamped upon it. The witnesses stated that the defendant had distinctive features, but admitted that they were all present in the photograph, i.e., that he had dark Indian skin, a distinctive nose, and white hair.

These two witnessses were not like Officer Glover, trained in identification, that the single photo would not taint their minds, In addition, Officer Glover had seen the defendant committing the crime. This is not so here. The witnesses' certainty at trial has been constitutionally tainted by the impermissible suggestive mug shot and the police officer's specific questions linking the defendant with buying gas in a container.

5. The time frame.

In this case, the time frame between the crime and the identification was eight days. It cannot be emphasized enough that six days after the crime, on October 23, the witnesses had no recollection of the defendant, previous to the single mug shot display and the suggestive questions by Officer Benequisto.

Mug shots, especially a single mug shot display, are prejudicial in and of themselves and to be avoided, unless there are exigent circumstances. See U.S. v. Harrington, 490 F.2d 487 (2nd Cir. 1973). The mug shot connotes a person who has had trouble with the law, to average laymen, of which Arnett and Parrot are.

In analyzing the impermissibly suggestive identification for reliability, using the five factors mandated in Manson, under the totality of the circumstances, the State did not meet its burden of showing by clear and

convincing evidence that the positive identification was independent of the impermissibly suggestive mug shot of the defendant shown to Arnett and Parrot and the specific questions of police Officer Benequisto linking the defendant to purchasing gas in the minds of the witnesses. The corrupting effect was too great. Neil v. Biggers, 409 U.S. 188, 199-200, (1972); See also, Workman v. Cardwell, (6th Cir.) 471 F.2d 909, cert. denied, 412 U.S. 32; Commonwealth v. Moon, 405 N.E. 2d 947 (Mass.1980); U.S. v. Barnes, 416 F.Supp. 1176 (D.C.N.Y.); 39 ALR 3d 1000.

CONCLUSION

The Connecticut Supreme Court misplaced its reliance upon Circuit Court opinions to justify its disregard of the five factor test propounded in Manson. This new "factorless, generic" totality test, used by both the

trial court and Connecticut Supreme Court vitiates the five factor Constitutional criteria mandated by this Court in Manson for reliability analysis and thereby violated the defendant's Constitutional right to the Due Process of Law as embodied in the Fourteenth Amendent of the United States Constitution.

For all the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

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APPENDIX

STATE OF CONNECTICUT v. DANIEL A. RAMSUNDAR
(12843)

Peters, C.J., Healey, Santaniello, Callahan and Hull, Js.

Headnote:

Convicted of the crime of arson in the first degree, the defendant appealed to this court claiming, inter alia, that the trial court erred in not suppressing the testimony of two witnesses who identified him as an individual who had purchased gasoline in a container on either the evening of the fire or the previous evening. The purchase in question had been made at a gasoline station in the area of the fire. The witnesses had initially failed to identify the defendant when they were shown a photograph of him by a police officer, but they later recognized him when he returned to the station two days after they were questioned by the officer.

Held:

1. Although , as conceded by the state, the police officer's display of the single photograph of the defendant to the

witnesses was unnecessarily suggestive, the trial court could reasonably have found that the corrupting influence of that display was minimal and did not result in a substantial likelihood of irreparable misidentification, and that the identifications were sufficiently reliable to be considered by the jury.

2. This court could not say that the trial court erred in admitting evidence of the defendant's prior misconduct directed toward the owner of the property where the fire occurred; that evidence was probative of the defendant's intent and motive for starting the fire.

3. The defendant failed to comply with the rules of practice for obtaining review of his claim of error concerning the trial court's instructions to the jury; this court, therefore, was not required to reach the merits of that claim.

(End of Headnote)

Argued March 3 -

decision released June 9, 1987

Information charging the defendant with the crime of arson in the first degree, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the jury before **Corrigan, J.**; verdict and judgment of guilty, from which the defendant appealed to this court. **No error.**

Joseph P. Secola, for the appellant (defendant).

Steven M. Sellers, assistant state's attorney, with whom, on the brief, was **Kevin P. McMahon,** assistant state's attorney, for the appellee (state).

CALLAHAN, J. The defendant was charged in an information with having committed the crime of arson in the first degree in violation of General Statutes sec. 53a-111.[1]

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[1] "(General Statutes) Sec. 53a-111. ARSON IN THE FIRST DEGREE: CLASS A FELONY.

He pleaded not guilty and elected a jury trial. He was found guilty as charged by the jury and was subsequently sentenced by the trial court to a term of ten years imprisonment. The defendant has appealed claiming that the trial court erred by: (1) failing to suppress both in-court and out-of-court identifications; (2) admitting into evidence his prior misconduct, his conviction for harassment[2] and his violation of

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(a) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes an explosion, and (1) the building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied; or (2) any other person is injured, either directly or indirectly; or (3) such fire or explosion was caused for the purpose of collecting insurance proceeds for the resultant loss; or (4) at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury."

[2] "(General Statutes) Sec. 53a-183. HARASSMENT: CLASS C MISDEMEANOR> (a) A person is guilty of harassment when: (1) By telephone he addresses another in or uses indecent or obscene language; or (2) with intent to harass, annoy or alarm another person, he communicates with a person by telegraph, mail, or any other form of

probation; and (3) commenting unfairly on the evidence in its instructions to the jury. We find no error.

The jury could reasonably have found the following facts: On October 17, 1984, at approximately 11 p.m., brothers Steve and Kenneth Dacunha noticed a fire in the rear yard at 41 Woodmere Road in West Hartford, across the street from Kenneth's home. The two men ran to the scene and observed the flames about two feet in height, confined to a strip of ground approximately 18 inches wide and 20 to 30 feet in length. Kenneth smothered the flames with his jacket and called the West Hartford fire department. While awaiting the arrival of the firemen, the two inspected the area of the blaze by

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written communication, in a manner likely to cause annoyance or alarm; or (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

flashlight. They smelled an odor of gasoline and saw a strip of liquid extending from a burned area of ground across the driveway to an exterior wooden porch at the rear of the house. They also observed that the rear porch was totally saturated with gasoline.

Shortly thereafter, police and fire officials arrived at the scene. They roused the occupants of the house, Olive Crompton and her daughter, Denise, and conducted an investigation. Deputy Chief Matteo Pascarelli of the fire department suspected arson. He testified that he had observed a "trailer"[3] of gasoline extending across the driveway to the back porch and that the back porch was "pretty well covered" with gasoline. He opined that had the fire reached the back porch it would have ignited the house and developed into a "major working fire" within ten minutes. He also testified

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[3] A trail of accelerant, gasoline in this case, is called a "trailer" by arson investigators.

that if the fire had reached the house it would have blocked access from the second floor to the first floor and prevented escape by way of the rear door. Deputy Chief Fire Marshall Richard Kane confirmed the fact that the fire had been deliberately set.

The occupants of the house, the Cromptons, were tenants. The house was owned by Ms. Lee Rice and was for sale. Prior to renting the house to the Cromptons, Rice, who had been romantically involved with the defendant since 1980, had lived there with him for approximately one year. The defendant was familiar with the house and had made various repairs to it, including repairs to the rear porch. After Rice had rented the house to the Cromptons, she and the defendant had moved to Rowe Avenue in Hartford where they continued to live together until early in 1984.

On February 12, 1984, Rice terminated her relationship with the defendant because he

had misappropriated $609 of her money, which she had earmarked for a mortgage payment on her West Hartford house. The defendant, who was upset and angry that Rice had ended their affair, moved out of the Rowe Avenue house the next day. Thereafter, the defendant harassed Rice in a misguided effort to revive their romantic relationship. On October 18, 1984, the day following the fire the defendant telephoned Rice and, laughing, said, "try and sell that house now."

As a result of an investigation, during which the defendant was identified as having purchased gasoline in a container at a Hartford gasoline service station on the night of either October 16 or 17, 1984, he was arrested and charged with arson in the first degree.

I

The defendant first claims that the trial court erred by failing to suppress both in-court and out-of-court identifications by two

witnesses, Patricia Parrott and Tammey Arnett. He contends that their identifications of him resulted from an unnecessarily suggestive procedure and were unreliable, and that the admission of their testimony violated his federal and state constitutional rights to due process.[4] We

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[4] The fourteenth amendment to the United States constitution provides: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article first, sec. 8, of the Connecticut constitution provides: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without

disagree.

The following testimony was elicited relating to the issue of the identification of the defendant by Parrott and Arnett: In October, 1984, Parrott was employed as a cashier at the self-service island of an Exxon service station located at the corner of Park Street and Prospect Avenue in Hartford. Arnett was a friend of Parrott's, often visiting Parrott and keeping her company in the cashier's booth during the evening hours. On October 23, 1984, while conducting a canvass of area service stations in connection with the investigation of the fire at 41 Woodmere Road, Detective Joseph Benequisto of the West Hartford police department interviewed Parrott and Arnett.

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due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment,, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger."

During the course of the interview, he showed them a single police "mug shot" which was a front and side view of the defendant. He then inquired whether the man depicted in the police photograph had purchased gasoline in a container at the station during the previous week. At that time neither Parrott nor Arnett was able to identify the person shown in the photograph.

Two days later, however, on October 25, 1984, when the defendant drove into the same Exxon station to purchase gasoline for his automobile, both Parrott and Arnett immediately recognized him as the man who had purchased gasoline in a container late in the evening on either October 16 or 17, 1984. Parrott and Arnett both testified that when they saw the defendant the second time, they recognized and remembered him because of his distinctive appearance.[5] As the defendant

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[5] The defendant does present a rather distinctive appearance. He is of Indian

left the service station on October 25, 1984, Parrott wrote down the number of the temporary registration marker on his automobile and called the West Hartford police.

Later Parrott and Arnett gave statements to the police identifying the driver of the automobile on October 25, 1984, as the same man who had purchased gasoline in a container at the Exxon station the previous week. Subsequently, at trial, both Parrott and Arnett positively identified the defendant as the driver of the automobile on October 25, 1984, and as the person who had purchased gasoline in a container on October 16 or 17, 1984.

"In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification

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descent, is quite tall, has very dark skin, abundant white hair and a prominent nose.

procedure was unnecessarily suggestive, and second, if it is found to be so, it must be determined whether the identification was nevertheless reliable based on an examination of the 'totality of the circumstances.'" State v. Theriault, 182 Conn. 366, 371-72, 438 A 2d 432 (1980); State v. Cubano, 203 Conn. 81, 93, 523 A2d 495 (1987); State v. Collette, 199 Conn. 308, 310, 507 A.2d 99 (1986); State v. Hinton, 196 Conn. 289, 292-93, 493 A2d 836 (1985).

In this case, the trial court found that the display of a single photograph of the defendant by Benequisto, coupled with his inquiry, was unnecessarily suggestive. See State v. Evans, 200 Conn. 350, 355-56, 511 A2d 1006 (1986); State v. Collette, supra. The state does not, on appeal, dispute that finding. We must, therefore, consider whether, based on an examination of the "totality of the circumstances," the identifications were nevertheless reliable.

State v. Austin,, 195 Conn. 496, 499, 488 A2d 1250 (1985).

The factors to be considered in determining the reliability of an identification subsequent to a suggestive identification procedure "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainly demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corruption effect of the suggestive identification itself." Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Cubano, supra, 95; State v. Collette, supra, 311 n.3; State v. Hinton, supra, 295-96.

Since neither Parrott nor Arnett was a victim of the arson in question or a witness to its actual occurrence, an analysis of the

circumstances of their identifications of the defendant does not fit neatly into the Manson matrix of factors normally considered in determining reliability. The factors considered in Manson, however, are not required to be present seriatim for an identification to be found reliable. United States v. Merkt, 794 F.2d 950, 958 (5th Cir. 1986), cert. denied, _U.S._ , 107 S. Ct. 1603, 94 L. Ed. 2d 789 (1987); United States v. Woolery, 740 F.2d 359, 360-61 (5th Cir. 1984), cert. denied, 469 U.S. 1208, 105 S. Ct. 1172, 84 L. Ed. 2d 322 (1985). We must examine the circumstances that did exist and determine on the whole whether any suggestiveness in the identification procedure created a very substantial risk of misidentification. United States v. Merkt, supra; United States v. Woolery, supra; State v. Fullwood, 193 Conn. 238, 245, 476 A.2d 550 (1984).

In this instance we think that it did not. Although neither Parrott nor Arnett recognized the person in the photograph when it was displayed to them by Detective Benquisto on October 23, 1984, both indicated, at that time, that the subject of the photograph looked familiar, and both expressed the thought that they had previously seen the man depicted. Parrott also recalled, when interviewed by the detective, that someone had recently purchased gasoline in a container, but she could not be sure whether he was the man shown in the photograph.

At trial, however, both Parrott and Arnett were positive of their in-court identifications of the defendant. They testified that on seeing him for a second time on October 25, 1984, their memories were triggered and they recalled his initial visit to the station during the middle of the previous week. Both said they were able to

remember the defendant clearly because of his distinctive appearance and because both thought it strange that anyone would purchase gasoline in a container late at night in October. While they also realized that the defendant was the person shown in the police photograph, both clearly possessed a stronger, independent recollection of the defendant from the viewing of his person on the night of their first encounter. The trial court found corroboration for these independent recollections on the part of the witnesses in the fact that there was a "lack of similarity" between the defendant's appearance in the photograph displayed and his corporeal appearance. The trial court noted that the photograph shown to the witnesses did not reveal the "highlights of the defendant's skin coloring, nor show the whiteness of (his) hair." See State v. Miller, 202 Conn. 463, 474, 522 A.2d 249 (1987); State v. Evans, supra, 355.

Further, it appears from the record that the witnesses' recollection of the defendant's appearance was not based on fleeting glances. On both occasions when Parrott and Arnett observed him, he was in close proximity for some minutes and they "(got) a good look at him" in the well lit self-service area. While he was not the subject of close scrutiny on the first occasion, Parrott and Arnett testified that their attention was drawn to him to a certain extent because business was slow at the time and because his purchase was somewhat unusual.

We conclude, therefore, that although "we examine the legal question of reliability with exceptionally close scrutiny and defer less than we normally do to the related factfinding of the trial court.", State v. Gordon, 185 Conn. 402, 416, 441 A.2d 119 (1981), cert. denied, 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982); the trial court in this instance could reasonably have

found that the corrupting influence of the photograph was minimal and that the identification procedure did not result in a very substantial likelihood of irreparable misidentification, and that the identifications were sufficiently reliable to be considered by the jury.[6]

"The exclusion of evidence from the jury is, however, a drastic sanction, one that is limited to identification testimony which is manifestly suspect." Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1986). Absent a very substantial likelihood of irreparable misidentification, "(w)e are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the

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[6] The trial court commented, in fact, that the identification testimony of Parrott and Arnett "rings with reliability." We agree.

weight of identification testimony that has some questionable feature." Manson v. Brathwaite, supra, 116. There was no error in the admission of Parrott's and Arnett's identification testimony.

II

The defendant next complains that the trial court erred in admitting evidence of his prior misconduct and his convictions of harassment and violation of probation.

At trial, the state was allowed to introduce evidence, through the testimony of Rice and several other witnesses, that the defendant had been harassing Rice since she had terminated her relationship with him. The testimony revealed that at various times over a period of months the defendant had slashed the tires on Rice's automobile, put sugar in the gas tank, and caused it damage by deliberately ramming it with his automobile. He had also, among other things, stolen her mail, threatened her, followed

her, and annoyed her with constant telephone calls, both at home and at her place of employment. Further, he had made disturbing telephone calls to Rice's mother, sister, friends and associates. He had admitted his conduct to Rice and to other witnesses who had testified to it at the trial.

The trial court instructed the jury, during the course of the trial and again in its final charge, that testimony concerning the defendant's misconduct prior to the date of the fire was not admitted into evidence to show that the defendant was possessed of a bad character, or to demonstrate that he had a propensity to commit crimes or to behave poorly. The trial court made it abundantly clear that the only purpose for which the evidence was admitted, and the only purpose for which it could be utilized, was to prove the defendant's state of mind in regard to Rice on October 17, 1984, as evidence of his possible intent to damage or destroy her

property and his motive for doing so.

Intent is an element of the crime charged and as such was required to be proved by the prosecution beyond a reasonable doubt. In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Pellegrino, 194 Conn. 279, 294, 480 A.2d 537 (1984). "Motive is not an element of the crime charged, and the state is under no obligation to show a motive for the accused to commit the crime charged." State v. Annunziato, 169 Conn. 517, 530, 363 A.2d 1011 (1975); State v. Rathbun, 74 Conn. 524, 529, 51 A.540 (1902). Such evidence is, however, important. State v. Harris, 182 Conn. 220, 224, 438 A.2d 38 (1980). "It strengthens the state's case when an adequate motive can be shown." Id.

As a general rule, evidence of guilt of other crimes or misconduct is inadmissible to prove that a defendant is guilty of the crimes charged against him. State v. O'Neill, 200

Conn. 268, 273, 511 A.2d 321 (1986); C. McCormick, Evidence (3d Ed. 1984) sec. 190; 1 F. Wharton, Criminal Evidence (13th Ed. 1972) sec. 170. Because of its prejudicial impact, it is well settled that evidence of prior acts of misconduct is inadmissible merely to show a defendant's bad character or tendency to commit criminal acts. State v. Johnson, 190 Conn. 541, 548, 461 A.2d 981 (1983). "Evidence of other misconduct, however, 'may be allowed for the purpose of proving many different things, such as intent, identity, malice, motive or a system of criminal activity.' State v. Ibraimov, [187 Conn. 348, 352, 446 A.2d 382 (1982)]. (Emphasis added.) State v. Braman, 191 Conn. 670, 675-76, 649 A.2d 760 (1983).

Such evidence is admissible if the trial court, in the exercise of its sound discretion, determines that its probative value, for one or more of the purposes for which it is admissible, outweighs its

prejudicial impact on the accused. State v. O'Neill, supra, 274; State v. Johnson, supra; State v. Falby, 187 Conn. 335, 338, 438 A.2d 107 (1980). "Because of the difficulties inherent in this balancing process, the trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done." State v. Johnson, supra, 548-49. On appellate review by this court we must give every reasonable presumption in favor of the trial court's ruling. State v. Ryan, supra; State v. Barlow, 177 Conn. 391, 394, 418 A.2d 46 (1979). The crime in this case was a seemingly inexplicable act of destruction. Evidence of the defendant's prior misconduct directed toward the owner of the house, which was the target of the arson, provided probative evidence of the defendant's intent and motive in starting the fire. We cannot say that the trial court erred in admitting it.

The defendant also mentions in his statement of issues and in his brief a claim that the trial court erred when it allowed the state to produce evidence of his guilty plea to harassment and his subsequent arrest for and his admission to a violation of his probation. The defendant has, however, failed to brief either of these issues. His brief is limited to a discussion of the admissibility of testimony concerning the defendant's behavior, which the court allowed as evidence of prior misconduct. Issues not briefed are considered abandoned. "Assignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court. . . .'" Hayes v. Smith, 194 Conn. 52, 66 n. 12, 480 A.2d 425 (1984); Cheney v. Strasburger, 168 Conn. 135, 142, 357 A.2d 905 (1975).

Even if we were to consider these issues, it would not affect the result. Evidence of

the defendant's guilty plea to a charge of harassment and his subsequent admission to violation of the conditions of his probation were, under the circumstances, admissions of prior misconduct which were properly admitted into evidence. See Grasso v. Frattolillo, 111 Conn. 209, 212, 149 A.838 (1930).

III

The defendant finally complains that the trial court erred in its charge to the jury by commenting on the evidence in a manifestly unjust, unfair and prejudicial manner.

The defendant took no relevant exceptions to the court's charge, nor as far as can be determined from the record, did he file any requests to charge. On this appeal, however, he has launched a wholesale attack on the court's instructions to the jury. He claims that the trial court in its charge overemphasized the evidence elicited in support of the state's case, but failed to comment on evidence favorable to the

defendant or detrimental to the state. He contends that, as a result, he was deprived of a fair trial and, consequently, his constitutional right to due process of law.

We need not reach the merits of the defendant's claim regarding the jury charge because he has failed to comply with the mandatory procedures of this court. Weintraub v. Richard Dahn, Inc., 188 Conn. 570, 571, 452 A.2d 117 (1982). When claiming error in the charge to the jury a party's brief must include a verbatim statement of all relevant portions of the court's charge and the exceptions thereto. Practice Book sec. 4065 (d)(2) (formerly sec. 3060F <c> <2>). Also, evidence relevant to the error must be printed in narrative form with appropriate references to the transcript. Practice Book sec. 4065. Because the defendant's brief does not comply with these provisions of the practice Book, and our perusal of the record discloses no reason to

depart from them, we decline to review the defendant's claim further. Weintraub v. Richard Dahn, Inc., supra, 572; Cahill v. Board of Education, 187 Conn. 94, 444 A.2d 907 (1982); Henderson v. Levy, 183 Conn. 517, 518, 441 A.2d 10 (1981).

There is no error.

In this opinion the other justices concurred.

THE ORAL OPINION OF THE CONNECTICUT SUPERIOR COURT OF THE JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD at the conclusion of a Suppression Hearing, as recorded in the official transcript at pp. 499-510, on June 24, 1985.

THE MOTION TO SUPPRESS HEARING

THE COURT: Well, it seems to the Court that the --that would run to the weight to be given by the fact finders. The issue before the Court is whether or not, first, that the offer of the photograph to the two witnesses who have testified in this motion was suggestive. And under ordinary circumstances, the case law bears you out that where a photograph is shown to an identifying witness and it's one photograph, and that is of then the one who is identified, is suggestive. And where the Court must find that as in this case, it must then go to the question of the reliability of

the witnesses to identify. And in this particular matter, both have indicated that when they were shown the photograph which they have now identified as State's Exhibit A for the purpose of the motion, that they both had indicated that the photograph of the person in the photograph looked familiar; but that they couldn't place him. Then upon October 25th when the person who they identified now in court as the defendant came into the station, they recognized him and both of them have indicated in their testimony not from the photograph that was shown to them, but that this was the same person who had been in the gas station the previous week and had obtained a small amount of gas that was preset and that he had apparently filled a container on the other side of the car not near the gas fill and that he had a distinctive look as Miss Arnett indicates, the dark colored skin, his white hair, his large nose, and his height was

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distinctive to her. And in the case of -- of Miss Parrott, she described his dark complexion and his white hair and his large nose as distinctive. Both have indicated that in viewing the photograph at this time that it does appear to be the defendant and the person who was in the station on the two occasions. However, Miss Arnett did indicate that there was a sizeable difference in the photograph to the defendant's appearance and of course the Court must agree that that is indeed so in that the photograph is a black and white and really doesn't see the highlights of the skin coloring, nor show the whiteness of the defendant's hair. So the Court must agree that making the comparison of State's Exhibit A to the defendant's appearance there is a lack of similarity because of the condition of the black and white photograph in comparison to the defendant's look. But the Court must agree that both witnesses testified it was not the

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photograph that identified the person who came in on October 25th, but they recognized this person as the same person who had been in the previous week. Any other matters would go to the question of weight rather than the admissibility. The Court must find that although as stated the first of the two prong test that there is a certain suggestiveness, but that evidence given by the two witnesses bear out the -- a certain amount of reliability, despite the suggestiveness which should be weighed by the fact finders and not weighed by the Court as a matter of law on admission of the evidence. So the Court and particularly with reference to State versus Austin, 195 Conn., 496 --

MR. JELLY: What was that cite, your Honor.

THE COURT: 195 Conn., 496, and it's State versus Austin. That although the factual situation is not completely the same, the analogy would be the same; and particular

reference to 501 and 502. And, therefore, the Court denies the motion to suppress.

MR. JELLY: I assume this means, first, that my request to be able to have the opportunity to offer the police report is denied, and the Court doesn't want --

THE COURT: In the trial itself it may not be.

MR. JELLY: But for the purposes of the hearing.

THE COURT: I don't see how the -- that offer would -- you've questions him apparently on the police report all through the hearing on a motion and --

MR. JELLY: I haven't had a chance --

THE COURT: Of course, I -- even though those questions could have been -- been objected to with success, unless the report was admitted as conflicting or inconsistent with their testimony, in which case that report would have been before them. No such objection was taken and the matters I assume

in the police report are before the Court as to any type of inconsistency and their ability to rebut any possible inconsistency.

MR. JELLY: The Court doesn't want to hear any argument from me in support of it.

THE COURT: I thought you had made your argument.

MR. JELLY: No, your Honor. All I started to do is whether or not I could put the police report in.

THE COURT: You want to argue further?

MR. JELLY: I do, your Honor.

THE COURT: You may.

MR. JELLY: Thank you. I'm not sure whether the Court is finding or will find that the procedure was in fact impermissibly suggestive along with the first prong of the test when this type of identification --

THE COURT: I've already indicated that I don't know how the Court could find otherwise when a photo of one individual is shown to an identifying witness, how the Court would not

say that there is not some suggestion.

MR. JELLY: All right. Well, among other reasons for my request that I put the police report in, your Honor, it's not just to go to credibility or weight; but as to showing what would be the best evidence of what the identification was about at the time that it was made. Each of the witnesses I thought said there wasn't any question in their mind that -- that that was a photograph of this man, although they indicated that he looked familiar. I claim the police report states that they said something quite different. And as for the basis of their identification on the 25th, I asked the questions of each of them with respect to what they told the police, which I think are very significant because the police report shows what the real focus of their mind was. That the person who was in looked exactly like the photograph they were shown. If there was -- I can't imagine a reason why they would have called

the police had they not been shown that photograph. There is just no way they would have called the police department had they not been shown that individual. This type of station and the amount of traffic that they testified to, the five factors that I've seen consistently innumerated are opportunity of the witnesses to view the person, the time, the degree of attention, and the accuracy of the entire description; the level of certainty at the ID, the time between the crime and the ID. At best, the time between the crime and the ID is eight days. At worst, it's nine days and the ID is not when the crime is being occurred. The level of certainty demonstrated I think is best illustrated by their failure to remember on the 23rd, either whether anyone was in to get any gas or whether that particular individual was in, and in accordance with Mr. McMahon's identification that the photo speaks for itself on the second witness. And the

testimony of the first witness, all of the distinctive factors they testified were present in that photo that they claim brought into their mind the next week. The procedure was not just suggestive, but I claim unreliable because they -- it was suggested to these witnesses not only that it was the person in the photo, but it was suggested to them what he had done and when he had done it.

Tammey testified that they were asked whether or not the person, any person or that person came in a week before and bought gas in a container. Did the person come in in the middle of the week? Did the person come in at night? The only thing that they both consistently denied is any knowledge of what the real crime was that they were looking for the person for; but it surely was fixed in their minds that the person whose photograph they'd been shown was somebody the police were interested in with respect to the

purchase of gas of a small amount in a container the week before, probably in the middle of the week. The police reports would have it indicated that they remember such things as the temporary plate from the week before. The level -- the police reports are very clear, the affidavits which the Court could take notice of, they're in the file, the application for the arrest warrant make it absolutely clear that the statements under oath by this officer or that they were told by these witnesses that it was a dollar or a gallon purchase. It was in a can. Both witnesses say they don't know how much was purchased. One witness didn't see a container and the other one talks about the possible plastic container which doesn't tell much. None of them are sure what night or what time. If the factors are enumerated are suppose to be weighed against the corruption effect and suggestive ID, I don't see how these become particularly reliable. These

girls testified they have no real familiarity with Indian individuals. This is, I'll agree, it's a very distinctive individual. And the proximity in time to the original showing of the photo was much better than the subsequent. If they had a reliable identification of that fellow, then it certainly could have been at the initial date then, and whether or not they told the police that they; were familiar with him or they thought they recognized him I think is extremely suspect since it's not mentioned in their statements or the police reports at all. And I can't imagine the police not including things that would assist them. The ability to describe and the individual is precluded by showing them that photo because he is so distinct, the photo immediately imprints him. The accuracy of their descriptions, they're quite conflicting. The degree of attention. It's not a situation where a gun is put to someone's face. Both

occasions Tammey's belief Patty was on the phone. Both occasions Patty doesn't even work there. She's just sitting there. She has no reason to be paying attention to anything. The witnesses are extraordinarily conflicting as to where the fellow even was by the car, and I don't see how that this amount of conflict makes it reliable.

I'm not surprised that they testified that it had nothing to do with the photograph, but on cross examination my recollection that Patty testified they did tell the police that it looked exactly like the fellow in the photograph. The photograph is what brings this as an issue in their mind because they did not give any description to the police of anyone buying gas the previous week nor were they asked for one. They only were asked apparently whether this photo had. I urge the Court to review those factors against the corrupting effect of such identification testimony. The precision of

their testimony certainly is about one factor, but there's such an imprecision both between them and between their own statements and the police statements. I don't see how there's any particular indicat of reliability or reliability as a whole of why the due process clause in State and Federal cases keep unreliable evidence out; particularly, when it's impermissibly suggestive. Because the cases are replete with holdings that this is inherently an unreliable type of evidence should begin with, particularly in the identification as we have here. Corrupting effect, previously there was some question as to whether or not any evidence would come in even after the first prong, and Mr. McMahon properly cites Neal versus Biggers, Manson versus Braithwaite, United States versus Raid and a whole list of other cases that chapter and verse follow in those. And all of those emphasize that although there is a totality of the

circumstances test, that these have to be weighed against the corruption effect. Going down the list of those five factors, I can't think of a single one that's very strong in favor of reliability based on these factors. Thank you.

THE COURT: The Court might indicate you can in any circumstances where evidence is given by human beings find little discrepancies where communications are made from one individual to another. And it's normal that the police would think of a can rather than the plastic container being used for gas since the state law requires a can. That a small amount of gas maybe a dollar. However, the Court has to look at what it has which is consistent not only that which is inconsistent or bearing discrepancies. And one of the factors that both witnesses indicated their memories were jogged that they previously had told the police that they couldn't remember somebody coming in for a

small amount of gas or seeking a container of gas on or about the particular days in question or the previous week. That suddenly when this person came in their memories were jogged, that this person had been in and had in fact bought a similar or small amount of gas. So, and likewise, their memories were jogged to a like automobile that was used on both occasions. And it's, although the Court hasn't used it, because the State hasn't argued it, but it's significant that the -- the description of that automobile fits that which was the defendant's. However, in determining the question of whether it's reliable, the Court has to look to see whether or not there would be any conspiracy by the witnesses along with any police suggestion to fabricate their testimony. And in this particular matter, both indicated that they hadn't met the defendant or the person who had come in to the gas station. Their memories had been jogged that he had

been in the previous week, and that their memories were jogged to the event of the previous week and not to the photograph. And it is true, of course, that this is inconsistent with the information they had previously given the police; but, again, the Court is aware of memory which is jogged by an event. But on the whole substance of their testimony, their testimony rings with reliability. It is consistent with the factors that the Court should consider and that the minor inconsistencies as communicated or at least recorded by the police do not amount to discrediting in any sense the -- that reliability. This doesn't prevent counsel for the defense of suggesting that this is to be used in the weighing of their identification, but it certainly is not sufficient to prevent the admission of the evidence. The Court again denies the motion to suppress.

MR. JELLY: Exception, please.

THE COURT: Exception may be noted. I suspect that the Reporter would want a short recess and the Court will stand in short recess.

(Whereupon, a recess was taken at 4:23 P.M.)